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No. 00-1385

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, *et al.*,

Petitioners,

v.

DELTA AIR LINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Under Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. § 152, First, does the statutory requirement to "exert every reasonable effort" to make and maintain agreements and to settle disputes create an obligation on the part of a union to take reasonable measures to stop its members from engaging in an unlawful job action which has the purpose and effect of disrupting transportation services to the public?

2. When a court is asked to enjoin a job action which is unlawfully disrupting transportation under the Railway Labor Act, based upon documentary evidence of unquestioned authenticity and other undisputed facts, does Section 7 of the Norris LaGuardia Act nonetheless prevent injunctive relief unless live testimony can be taken, if the result is to allow a disruption to air transportation services to continue unabated?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Delta Air Lines, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent Delta Air Lines, Inc. ("Delta") submits this brief in opposition to the Petition for Writ of Certiorari submitted by the Petitioners Air Line Pilots Association, International, *et al.* ("ALPA").

STATEMENT OF THE CASE

1. The statutory framework. This case arises under the Railway Labor Act (45 U.S.C. §§ 151 to 188). The primary purpose of that Act is "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151a(1). To achieve this central goal, the Act explicitly compels airlines, their unions, and their employees (1) "to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier" (45 U.S.C. § 152, First); and (2) to maintain the status quo with respect to "rates of pay, rules, or working conditions" during contract negotiations until the parties have exhausted the Act's bargaining procedures. 45 U.S.C. §§ 155-56.

2. The job action. This case involves a job action by pilots employed by Respondent, Delta Air Lines, Inc. ("Delta"). These pilots are represented for purposes of collective bargaining by Petitioner ALPA. The individual Petitioners are all officers of ALPA and members of its governing body at Delta, the Master Executive Council.

Dissatisfied with the pace of negotiations for a new collective bargaining agreement, in the fall of 2000, a number of Delta's pilots began to act in concert to disrupt Delta's operations through a ban on "overtime" flying in order to force Delta into concessions at the bargaining table. As the

district court observed, the campaign was orchestrated primarily through e-mails and other written communications, which were "explicit as to why the overtime ban [was] encouraged [*i.e.*, to obtain contract concessions from the Company] and how to effectuate it . . . ." Pet. App. 29a, 36a. These communications urged Delta pilots to refrain from various types of overtime flying, to avoid telephone calls from the Company's crew schedulers, and to intimidate and harass those volunteering to fly the "banned" overtime. Pet App. 29a.

3. The litigation. On December 5, 2000, Delta filed a lawsuit and a motion for an emergency injunction in Atlanta against ALPA, 48 named individual pilots (including ALPA's officers) and 200 unnamed pilots (John and Jane Does) in order to stop the job action. A hearing was held on December 6, 2000. Petitioners were represented at the hearing by their regular outside counsel and by local counsel, and a number of the individual Petitioners attended the hearing in person. For several hours, the parties presented argument and introduced extensive written materials, reflecting communications between and among ALPA, its officers, and its members.

Delta argued that ALPA and its officers had been involved in designing and implementing the job action, and introduced documentary evidence to prove the point.[1] Many of the documents relied upon by Delta were e-mail messages posted

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1. For example, Delta pointed to a document written by ALPA's top officer at Delta (the Chairman of the Delta/ALPA Master Executive Council) urging pilots to boycott a particular form of overtime and instructing members on how to avoid crew schedulers calling to give them mandatory assignments. Delta also pointed to an official resolution of one of the local units of ALPA, publicized in an ALPA publication, endorsing a no-overtime campaign. ALPA never disputed the authenticity of these documents.

on an ALPA-sponsored computer-based website accessible only to Delta pilots.[2] Delta argued, however, that regardless of ALPA's role in starting the job action, at a minimum, ALPA had failed, in the language of the statute, "to exert every reasonable effort . . . to avoid any interruption to commerce or to the operation of any carrier. . . ." by failing to condemn the job action vigorously, repudiate the statements and actions of its officials, or investigate and discipline those engaged in the unlawful conduct.

For their part, Petitioners did not submit evidence disputing that a job action by ALPA members was underway, and that the job action was an attempt by ALPA members to apply leverage to the Company during negotiations in aid of ALPA's bargaining position. Petitioners, however, (a) denied that they had any involvement in instigating the job action; and (b) denied that they had any responsibility under the statute even to try to end it. Petitioners also pointed to documents in which (1) ALPA had earlier urged Delta pilots to fly some forms of overtime (the type that would cost the airline the most money); and (2) ALPA repeatedly emphasized that no pilot could be compelled to bid for voluntary overtime.[3]

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2. Some of the messages were signed; others were unsigned or used a pseudonym.

3. Delta's evidence also demonstrated that the job action had forced it to cancel hundreds of flights, stranding or inconveniencing thousands of passengers, doing serious and irreparable damage to Delta and to the traveling public. Although this evidence was not necessary to Delta's request for injunctive relief, *Consolidated Rail Corp. v. RLEA*, 491 U.S. 299, 303 (1989) ("The district courts have subject-matter jurisdiction to enjoin a violation of the status quo pending completion of the required procedures, without the customary showing of irreparable injury"), Petitioners did not seriously contest the evidence.

4. The district court decision. Based upon the documentary evidence in the record, the authenticity of which was never disputed, and upon Petitioners' own admissions, the district court held: (a) that there was an unlawful, "ongoing concerted effort on the part of some Delta pilots to refuse overtime work"; (b) that the job action "has primarily been effectuated through e-mails, many of which rise to the level of intimidation and harassment"; (c) that these efforts were intended "to undermine contract negotiations"; (d) that the job action had cost Delta millions of dollars and that Delta had suffered and was continuing to suffer "immeasurable" damage in terms of the good will of the traveling public; and (e) that the public had suffered an immeasurable loss in time and money from the delays and cancellations. Pet. App. 29a, 36a.

Nonetheless, the district court refused to enter an injunction against Petitioners because, as the court explained, it would not "hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members. . . ." Pet. App. 40a. In so concluding, the court did not mention the RLA's explicit command that the parties "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier," or, indeed, make any reference to the text of the statute or any case circumscribing the union's "reasonable effort" obligations in this way. Pet. App. 31a. Rather, the court simply observed — inaccurately[4] — that where courts

4. *See American Airlines, Inc. v. TWU*, 45 F.R.D. 1, 3 (N.D. OK. 1968) ("Court is not concerned with their direct involvement . . . [but] only . . . with . . . means to prevent its continuance. . . . [U]nions are responsible when their members unlawfully commit a

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had enjoined RLA unions in the past, it had been solely on the ground that the union had shared some culpability for instigating the job action.

5. The court of appeals decision. A unanimous panel[5] of the court of appeals reversed. Putting to one side Delta's argument that Petitioners had been actively engaged in planning and implementing the job action, the court stated:

> The district court erred in failing to appreciate the depth and seriousness of the duty to "make and maintain agreements" in a way so as "to avoid any interruption to commerce or to the operation of any carrier." 45 U.S.C. § 152 First. In the instant case, our focus is on ALPA's duty to maintain agreements to avoid interruption of commerce. As the Supreme Court has stated, this

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walkout . . . [t]hus, whether these Defendants were directly involved . . . is not an issue . . ."); *REA v. BRAC*, 264 F. Supp. 241 (S.D.N.Y 1967); *REA Express v. BRAC*, 74 L.R.R.M. 2436, 2439 (E.D.N.Y. 1970) (International Union did not authorize strike, and told locals that strike was illegal; nonetheless, it was enjoined to take steps to stop strike and to invoke discipline because it took no action to penalize those responsible for strike and failed to warn members against unauthorized strike); *Long Island R.R. v. System Fed'n*, 289 F. Supp. 119, 125 (E.D.N.Y. 1968) (union enjoined for slowdown and overtime ban, despite arguing that "decline in production . . . is not the result of any action or omission on its part"; "railroad argues that the sharp . . . decline in output . . . is itself evidence of a deliberate slowdown . . . The Court need not be blind to the obvious.")

5. Judges Tjoflat and Barkett of the Eleventh Circuit and Judge Magill of the Eighth Circuit sitting by designation.

> language of the RLA creates a substantive legal duty "enforceable by whatever appropriate means might be developed on a case-by-case basis." *Chicago & N.W. Ry. Co.*, 402 U.S. at 577 . . . An injunction is an appropriate remedy to compel the performance of this legal duty. . . .
>
> The district court's error came in its decision that it would "not hold that a union has an affirmative duty to end or prevent the unilateral unlawful activity of its members." The RLA imposes such a duty on the union in section 152 First, and the district court should have enforced that duty. . . . *22/* . . . The duty of ALPA under the RLA is sufficiently high that even if it has not sponsored or ratified the unlawful job action by the pilots, it has a duty to end such unlawful action.

Pet. App. 16a-19a.

The court also answered Petitioners' contention that live testimony would be required before any injunction could be issued. Relying on settled law from this Court, the court of appeals held that the substantive statutory duty to exert every reasonable effort to make and maintain agreements "take[s] precedence over the more general provisions of the [Norris LaGuardia Act]." Pet. App. 11a. In particular, the court concluded that the live testimony provision was simply irrelevant in the circumstances. The court noted that ALPA never questioned the reliability of the evidence on which the court's decision turned:

> (1) written documents reflecting the pilots' overtime boycott (mainly . . . e-mail communications);

> (2) union pronouncements and directives, which were concededly authentic; (3) statements of union members acknowledging the existence of the overtime boycott, which were concededly genuine; and (4) statistical evidence of the impact of the ban, which was not challenged by ALPA.

Pet. App. 21a.[6] In the absence of any material dispute about the documentary evidence on which the decision turned, the court held, the live testimony provision did not come into play.

Thus, the court ordered that "[u]pon remand, the district court . . . issue appropriate injunctive relief directing ALPA to take further steps to end the pilots' no-overtime campaign. Further steps may include issuing directives as drafted by the court and threatening (or imposing) union sanctions for violations. . . ." Pet. App. 26a. Petitioners' petition for rehearing en banc was denied on February 9, 2001. The district court entered an injunction on February 14, 2001.

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6. As noted *supra* at n.3, the evidence of irreparable harm to which the court referred was not essential to the court's disposition.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW REGARDING THE DUTIES OF RLA UNIONS PRESENTS AN UNEXCEPTIONAL APPLICATION OF SETTLED LAW AND PRESENTS NO ISSUE WORTHY OF REVIEW

Petitioners claim that by relying upon the Railway Labor Act's requirement that the parties must exert every reasonable effort to make and maintain agreements and to settle disputes, the court of appeals departed from this Court's decisions in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 931 (1982) (case not arising under the labor laws); *Carbon Fuel Co. v. UMWA*, 444 U.S. 212, 216 (1979) (case decided under National Labor Relations Act or "NLRA"); and *Coronado Coal Co. v. UMWA*, 268 U.S. 295, 304 (1925) (NLRA case). Petitioners claim these cases stand for the proposition that "membership organizations, including unions, can be held responsible only for their own wrongdoing, not the unauthorized, unratified acts of their members." Pet. 5.

By characterizing the question in this way, Petitioners hope to obscure the question actually posed to the court of appeals in a way that contrives a question worthy of certiorari. In fact, these cases are irrelevant for a variety of reasons

First, the court of appeals did not hold Petitioners "responsible [for] the unauthorized, unratified acts of the[] [union's] . . . members;" it held that Petitioners have *their own duty* to make every reasonable effort to stop the job action which was designed to aid Petitioners' leverage in collective bargaining negotiations. The plain text of the RLA

commands Petitioners to make every reasonable effort to make and maintain agreements and to settle all disputes, the court reasoned, and the evidence indicated that Petitioners failed to do so.

Thus, the court did not, as Petitioners claim, "require[] [them] to 'end' unauthorized employee activity." Pet. 6-7. Indeed, the court recognized the distinct possibility that Petitioners' best efforts ultimately might be insufficient to bring the job action to an end. Pet. App. 19a-20a. If Petitioners were to exert the required effort, but to no avail, the court suggested, Petitioners' statutory duty would have been satisfied, their accountability for the job action would end, and the district court's obligation under the law would then be to fashion an appropriate remedy against the union members engaging in the job action. *Id.*[7]

Second, the cases cited by Petitioners involved damages claims in which the plaintiff sought to impose derivative financial liability on the "organization" for conduct in which the organization was not itself involved. Here, in contrast, only injunctive relief was at issue at this stage of the proceedings — injunctive relief based on the duty of all parties under the RLA to prevent disruptions to the traveling public and to interstate commerce. Neither the district court nor the court of appeals was called upon at this stage of the

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7. Petitioners also argued in the courts below that individual union members cannot be enjoined because they have no legal duty under the RLA in view of the carrier's obligation to deal exclusively with the union in matters relating to collective bargaining. *See Brotherhood of R.R. Trainmen v. Toledo, P.& W. R.R.*, 321 U.S. 50, 61 (1944). Thus, in Petitioners' view, no one could be enjoined, and an unlawful job action which disrupts the traveling public can continue while the courts would be powerless to intercede.

proceedings to address whether, or in what circumstances, Petitioners might be held financially accountable for the job action.

Finally, Petitioners rely almost exclusively on cases decided under the National Labor Relations Act ("NLRA"),[8] a statute which has no language similar to the language of the RLA upon which the decision here was based: the RLA's central imperative that employers, employees, and unions must make every reasonable effort "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein," 45 U.S.C. § 151a(1).[9]

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8. Petitioners also cite a number of NLRA appellate decisions. *North American Coal Corp. v. Local Union 2262, UMWA*, 497 F.2d 459 (6th Cir. 1974); *Philadelphia Marine Trade Ass'n v. Local 1291, ILA*, 909 F.2d 754 (3d Cir. 1990), *cert. denied*, 498 U.S. 1083 (1991); *United Steelworkers v. Lorain*, 616 F.2d 919, 921 (6th Cir. 1980), *cert. denied*, 451 U.S. 983 (1981); *Prater v. UMWA*, 793 F.2d 1201 (11th Cir. 1986). Because they construe a materially different statute and arise in different contexts, they are irrelevant for the reasons given in the text. Petitioners also cite *Fry v. ALPA*, 88 F.3d 831, 842 (10th Cir. 1996), which arose under state tort law, not the Railway Labor Act. *Fry* involved damage claims against ALPA based on violent and threatening conduct by ALPA members. The Tenth Circuit concluded that ALPA *could have been* held liable for damages in that case had the plaintiff shown that ALPA had actual knowledge of the actions of its members and "fail[ed] to take affirmative remedial action," but concluded that the plaintiff had failed to do so in that case.

9. "The fundamental premises and principles of the [RLA] are not the same as those which form the basis" of the NLRA. *Brotherhood of R.R. Trainmen v. Chicago River & Ind. R.R. Co.*, 353 U.S. 30, 31 (1957).

The NLRA creates "no general anti-strike policy," and, contemplates the "exercise of [] 'economic' weapons" as a central feature of the Act's design.[10] Thus, under the NLRA, a union has no statutory duty to prevent interruptions to commerce or harm to the public interest. *Carbon Fuel, supra.* In contrast the "major purpose of Congress in passing the Railway Labor Act was 'to provide a machinery to prevent strikes.' " *Texas & N.O.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930). That is why Congress placed at the "heart"[11] of the RLA the duty "to exert every reasonable effort to . . . avoid any interruption to commerce or to the operation of any carrier. . . ." 45 U.S.C. § 152, First. This notion — the affirmative duty of the parties to protect the public interest — is central to the RLA but entirely alien to the NLRA.

Because the opinion below is entirely consistent with the decisions of this court, and creates no division of authority among the circuits, Petitioners are left to complain that as a factual matter, the court of appeals failed to credit all Petitioners claim to have done in their asserted attempt to dissuade ALPA members from the overtime ban. Even if they were correct in this assignment of error (and they are not[12]), the court of appeals' claimed mistake would not

10. *NLRB v. Insurance Agents*, 361 U.S. 477, 510 (1960).

11. *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377-78 (1969).

12. For example, when, as mentioned above, the Dallas-Fort Worth (DFW) unit of ALPA passed a resolution endorsing the overtime ban, ALPA never repudiated the resolution or disciplined — or even corrected — the union officials responsible; when the Chair of the DFW unit sent a letter to a list of ALPA officials and (Cont'd)

warrant review by this Court. No broad principle of law would be implicated by that question, and no issue of national importance hinges upon its resolution. Supreme Court Rule 10(a). "It is . . . axiomatic that this Court cannot devote itself to error correction. . . ." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998). There is no issue worthy of certiorari here.[13]

II. NO SIGNIFICANT ISSUE FOR REVIEW IS PRESENTED AS TO THE ISSUANCE OF AN INJUNCTION WITHOUT "LIVE TESTIMONY"

The court of appeals held that Section 7 of the Norris LaGuardia Act, 29 U.S.C. § 107, does not obligate a trial court to hold an evidentiary hearing before issuing an RLA status quo injunction if the injunction is warranted on a stipulated or uncontested set of facts. This holding was entirely unexceptional and in line with all of the relevant authority. Although Petitioners contrive to demonstrate a

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members suggesting that a "grassroots" overtime ban was "probably legal," ALPA did not correct or repudiate the statement or discipline the official involved; and when two ALPA members sent an e-mail to several dozen pilots (including MEC members) encouraging the overtime ban, ALPA did not repudiate the e-mail or discipline those involved.

13. Because the litigation here has not proceeded beyond the stage of preliminary injunction, grant of certiorari could lead to fragmented litigation and piecemeal review. A different legal issue will be presented if Delta, in the permanent injunction proceeding, ultimately succeeds in proving that ALPA's statements in regard to the pilots' overtime ban amounted to ratification. Still another legal issue will be presented if ALPA's exercise of every reasonable effort to curb the overtime ban is unsuccessful, and the courts below approve an injunction against individual pilots.

split in the circuits on the issue, a review of the cases cited by Petitioners demonstrates that none exists.

The Third Circuit in *United Tel. Workers v. Western Union Corp.*, 771 F.2d 699 (3d Cir. 1985) (a case arising under the National Labor Relations Act), expressly acknowledged the rule applied in other circuits — that no live testimony is required "where the relevant facts are undisputed or would not be enlightened by oral testimony." *Id.* at 705. Similarly, in *UAW v. LaSalle Mach. Tool, Inc.*, 696 F.2d 452, 456-458 (6th Cir. 1982) (also an NLRA case), the court held only that "when the allegations of a complaint seeking an injunction are denied by the defendant, the defendant is entitled to a hearing on *controverted facts* as well as upon questions of law." *Id.* at 457 (emphasis added). Finally, in *In re District No. 1-Pacific Coast Dist., Marine Eng'rs Beneficial Ass'n*, 723 F.2d 70, 77 (D.C. Cir. 1983) (yet another NLRA case), the district court had failed to comply with *any* of the relevant NLGA requirements — failing even to make findings of fact — because it was wrongly operating on the assumption that it was issuing a TRO rather than a preliminary injunction.

None of these cases, then, requires live testimony where the material facts are drawn from documents of unchallenged authenticity. On this question — the one presented below — the court of appeals' decision was consistent with every reported appellate decision on point. *See Railway Express Agency, Inc. v. Brotherhood of Railway, Airline & Steamship Clerks*, 437 F.2d 388 (5th Cir.) (RLA case; where the few disputed facts were not material to the propriety of an injunction, no live testimony required), *cert. denied*, 403 U.S. 919 (1971); *see also Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (NLRA case; no live

testimony where relevant facts are essentially undisputed); *Drywall Tapers & Pointers v. Operative Plasterers' and Cement Masons' Int'l Ass'n*, 537 F.2d 669 (2d Cir 1976) (NLRA case; injunction properly issued where both sides submitted extensive affidavits and documents and the primary issue — the meaning of a contract — was not one on which testimony would have aided the court); *Hoh v. Pepsico, Inc.*, 491 F.2d 556 (2d Cir. 1974) (NLRA case; noting in *dicta* that injunction could properly be issued where necessary facts are undisputed).

In this case, "both sides presented sworn affidavits and a host of other evidence and testimony." Pet. App. 21a. Delta offered to put on its declarants as live witnesses, but the district court decided to proceed without live testimony. "[Delta's] evidence was largely undisputed — particularly as it related to the fact that the pilots were undertaking concerted action." *Id.* "Given that there was no dispute about the reliability of the evidence, at least as to the concerted action by the pilots, we believe the district court was entitled to rely upon such evidence to make its determinations."[14] *Id.*

Indeed Petitioners identify only one factual dispute as to which they assert oral testimony should have been taken: whether more vigorous efforts by ALPA "[w]ould have affected the amount of voluntary overtime flying the pilots performed." Pet. 10. Petitioners again miscast the holding

14. On the other hand, the court recognized the limits of its conclusion: "We do not pass judgment at this time as to whether there was reliable and undisputed evidence about ALPA's involvement in the no-overtime campaign. There appears to be a genuine dispute over ALPA's involvement sufficient to necessitate live testimony as contemplated by the NLGA, 29 U.S.C. § 107." Pet. App. 26a.

of the court of appeals. The court did not, as Petitioners suggest, impose upon ALPA strict liability for the conduct of its members; it simply recognized ALPA's legal duty to make every reasonable effort, as the members' exclusive bargaining representative, to prevent its members from engaging in illegal concerted activity in aid of ALPA's bargaining power. Even assuming that ALPA had offered to provide testimony to the effect that its efforts would not have succeeded (and, significantly, Petitioners did not claim at the district court hearing to have any such evidence, or claim that they wanted time to obtain it), it would not have mattered to the disposition of the issue. Petitioners' statutory obligation, the court held, was to *try* to end the job action, not to succeed.

Petitioners' real complaint is that the court of appeals erred in deciding that all the relevant facts were undisputed. Even if this conclusion was erroneous (and it plainly was not), no question warranting certiorari would be presented. This Court does not generally concern itself with the misapplication of accepted legal standards to the facts of particular cases. The Court "does not sit primarily to correct what [it] perceives[s] to be mistakes committed by other tribunals." *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). As previously noted, "[i]t is . . . axiomatic that this Court cannot devote itself to error correction. . . ." *Calderon v. Thompson*, 523 U.S. 538, 569 (1998); *see also Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting) ("[i]t is not appropriate for this Court to expend its scarce resources crafting opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law").

CONCLUSION

The petition should be denied.

Respectfully submitted,

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